Formosa Resort Properties Sdn Bhd v Bank Bumiputra Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-02–223 OF 2007
SURIYADI, ZAINUN ALI AND SULAIMAN DAUD JJCA
23 FEBRUARY 2009

Evidence — Burden of proof — Forgery of signature — Failure to compare and contrast signatures on cheques with signature spesimen card — Whether appellant failed to prove case on balance of probability that signatures on cheques were forged

Evidence — Expert evidence — Acceptance of expert evidence — Whether judge could exercise discretion accepting expert opinions

The appellant, a private company incorporated in Malaysia was a customer of the respondent, a banker. The appellant had an account at a branch office of the respondent. The respondent over a period of time paid out various sums of monies in respect of cheques presented to it and subsequently debited into the appellant's banking account. The appellant claimed that 67 cheques totalling RM411,024.70 were not drawn by it or it had authorised the drawing of the cheques. The appellant mentioned that the cheques were issued by one Voon Ai Foon and one Ong Ah Sim @ Ong Swee Hoe ('Ong Swee Hoe') as representatives of the appellant. Voon Ai Foon an employee of the appellant at the material time controlled the appellant's cheque books. The appellant argued that the respondent should have known that the cheques were forged and hence the respondent was liable to refund to the appellant the debited sum of monies. A forensic analyst ('PW1') engaged by the appellant reported that the signatures on all the 67 cheques differed with the spesimen signatures given by the appellant. A director of the appellant, PW2, at the material time submitted that the signatures of Ong Swee Hoe were forged on the 67 cheques. However, the respondent's witness, DW1, submitted that Ong Swee Hoe was a frequent visitor of the respondent's bank to cash in cheques, which raised doubt as to the implausibility that the payment of the cheques were not mandated. The learned judge critically went through the evidence, in particular every spesimen and the 67 cheques which were alleged forged, by making his own observation and assessing the signatures of Ong Swee Hoe's signature. On appraisal he found that the signatures in the spesimen signatures were not similar, constant or consistent. He found that the signatures were subject to variations.

Held, dismissing the appeal with costs:

(1) The learned judge was not satisfied that the signatures of Ong Swee Hoe

allegedly forged on the 67 cheques were conclusively proven. The learned High Court judge surmised that there was every possibility that the alleged forged signatures were genuine but signed differently. The learned judge had appreciated the evidence and the cogent reasons submitted and hence, he could not be said to have been plainly wrong. He may accept the evidence of an expert but only if he was satisfied after making his own observation that it was safe to accept the expert opinions (see paras 12 & 13). (*Dr Shanmuganathan v Ramasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61).

(2) The appellant had failed to compare and contrast the signatures on the cheques, with the signature on the signature spesimen card or at worst the signature on the application form. The existence of the signature spesimen card was confirmed by DW1 in the course of his evidence. Apart from the spesimen card the appellant could have subpoenaed an officer from the respondent's bank to produce the application forms, which would have shown the signature of Ong Swee Hoe. To totally side line the spesimen signature card or the application form was disastrous for the appellant (see paras 21 & 22).

(3) As the appellant had alleged that the signatures in the 67 cheques are forgeries, the onus to establish the fact lies with the appellant (*Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218). The respondent was not fettered with any responsibility that it must prove that the signatures on the 67 cheques were that of Ong Swee Hoe's. Sifting through the evidence adduced by the appellant by no stretch of the imagination has PW1 or PW2 or the combined effect of their evidence sufficiently proved that the 67 cheques were forged and thus, the appellant had failed to prove its case on balance of probability (see paras 23 & 24). (*Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62).

[Bahasa Malaysia summary

Perayu, syarikat swasta yang diperbadankan di Malaysia adalah pelanggan responden, sebuah bank. Perayu mempunyai akaun di pejabat cawangan responden. Responden, untuk satu tempoh masa, telah membayar pelbagai jumlah wang bagi cek-cek yang dikemukakan kepadanya dan seterusnya mendebitkan ke dalam akaun perbankan perayu. Perayu mendakwa bahawa 67 cek berjumlah RM411,024.70 tidak dikeluarkan olehnya atau memberi kuasa kepada pengeluaran cek-cek. Perayu menyatakan bahawa cek-cek yang diisukan oleh Voon Ai Foon dan Ong Ah Sim @ Ong Swee Hoe ('Ong Swee Hoe') adalah sebagai wakil-wakil kepada perayu. Voon Ai Foon merupakan pekerja perayu pada masa material telah menjaga buku-buku cek perayu. Perayu menghujahkan bahawa responden sepatutnya tahu bahawa cek-cek tersebut telah dipalsukan dan dengan itu, responden adalah bertanggungan untuk memulangkan kepada perayu jumlah wang yang telah didebitkan.

Seorang pakar analisa forensik ('PW1') yang diupah oleh perayu melaporkan bahawa tandatangan-tandatangan di dalam kesemua 67 cek berbeza dengan tandatangan spesimen yang diberikan oleh perayu. Seorang pengarah kepada perayu, PW2, pada masa material menghujahkan bahawa tandatangan-tandatangan Ong Swee Hoe telah dipalsukan di atas 67 cek tersebut. Walau bagaimanapun, saksi responden, DW1, menghujahkan bahawa Ong Swee Hoe kerap mengunjungi bank responden untuk menunaikan cek-cek, yang mana membangkitkan keraguan bagi tidak mempercayai bahawa bayaran cek-cek tidak dimandatkan. Hakim telah meneliti bukti secara kritikal, khususnya setiap spesimen dan 67 cek tersebut yang didakwa dipalsukan, dengan membuat pemerhatian sendiri dan membuat penilaian ke atas tandatangan-tandatangan Ong Swee Hoe. Semasa penelitian, hakim mendapati bahawa tandangan-tandatangan di dalam spesimen tandatangan adalah tidak serupa, tetap dan konsisten. Beliau mendapati terdapat perbezaan pada tandatangan-tandatangan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim tidak berpuas hati bahawa tandatangan-tandatangan Ong Swee Hoe yang didakwa memalsukan 67 cek tersebut telah secara kesimpulannya dibuktikan. Hakim Mahkamah Tinggi menyatakan bahawa terdapat kemungkinan bahawa dakwaan tandatangan-tandatangan tersebut dipalsukan adalah tulen tetapi ditandatangan secara lain. Hakim yang arif juga bersetuju dengan bukti dan yakin dengan alasan-alasan yang dihujahkan dan dengan demikian, beliau tidak boleh dikatakan sebagai salah. Beliau boleh menerima bukti pakar tetapi hanya jika beliau berpuas hati selepas membuat pemerhatian bahawa adalah selamat untuk menerima pendapat pakar (lihat perenggan 12 & 13). (*Dr Shanmuganathan v Ramasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61 dirujuk).

(2) Perayu telah gagal untuk membeza dan mengkontrakan tandatangan-tandatangan di dalam cek, di mana tandatangan di dalam kad spesimen tandatangan atau lebih teruk lagi tandatangan di atas borang permohonan. Kewujudan kad spesimen tandatangan disahkan oleh DW1 di dalam keterangannya. Selain daripada kad spesimen, perayu telah menghantar sepina kepada pegawai yang mana bank responden mengeluarkan borang permohonan, yang akan menunjukkan tandatangan Ong Swee Hoe. Untuk mengenepikan kad spesimen tandatangan secara keseluruhan atau borang permohonan adalah memudaratkan kepada perayu (lihat perenggan 21 & 22).

(3) Memandangkan perayu mendakwa bahawa tandatangan-tandatangan di atas 67 cek tersebut adalah palsu, beban untuk mewujudkan fakta terletak pada perayu (*Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218). Responden tidak dibebani dengan sebarang

tanggungan bahawa dia mesti membuktikan tandatangan-tandatangan di atas 67 cek tersebut adalah milik Ong Swee How. Menapis bukti yang dikemukakan oleh perayu tanpa sebarang tambahan mendapati PW2 atau PW1 atau gabungan kesan bukti-bukti mereka membuktikan secukupnya bahawa 67 cek tersebut telah dipalsukan dan dengan itu, perayu gagal membuktikan kesnya di atas imbangan kebarangkalian (lihat perenggan 23 & 24). (*Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62).]

Notes

For cases on expert evidence in general see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1656–1789.

For cases on forgery of signature, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 575–585.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 3 CLJ 1, FC (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 62, CA (refd)

Commissioners of Taxation v English, Scottish and Australian Bank Ltd [1920] AC 683 (refd)

Doe D Devine v Wilson (1855) 14 ER 581 (refd)

Dr Shanmuganathan v Ramasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (refd)

Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Great Western Railway Co, The v The London and County Banking Co Ltd [1901] AC 414 (refd)

London Joint Stock Bank Ltd v Macmillan and Arthur [1918] AC 777, HL (refd)

PP v Mohamed Kassim bin Yatim [1977] 1 MLJ 64, FC (refd)

Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd [1988] 3 MLJ 218, HC (refd)

United Dominions Trust Ltd v Kirkwood [1966] 2 QB 43 (refd)

Appeal from: Civil Suit No 22–333 of 1999 (High Court, Melaka)

Chew Wee Kian (HS Chew & Co) for the appellant.
Wong Hor Mun (Azim Tunku Farik & Wong) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] This appeal was heard by this panel and was unanimously dismissed with costs.

[2] The plaintiff company ('the appellant'), is a private company incorporated in Malaysia under the Companies Act and at the material time was a customer of the respondent. The respondent is and was at all material times a banker, carrying on its business at a branch office in Melaka. The appellant had an account at the said branch with the respondent. Between the period of 27 November 1993 until 3 October 1995, the respondent paid out various sums of money in respect of various cheques amounting to RM414,024.70 payable to the bearer, and had debited the account belonging to the appellant. 68 pieces of cheques (P3–P70) were involved altogether. The appellant alleged that it did not draw those cheques or authorised the drawing of those cheques and thereafter through its solicitors claimed that abovementioned sum from the respondent.

[3] At the commencement of the trial the appellant withdrew its claim in regard to cheque No 757318 dated 27 November 1993 for the sum of RM3000 conceding that the claim for that sum to be time barred. Therefore the claim before us was only for 67 cheques totalling RM411,024.70.

[4] As per the statement of claim the appellant pleaded that the cheques were issued by one Vong Ai Foon and one Ong Swee Hoe, as representatives of the appellant. The respondent should know that the cheques were forged by Vong Ai Foon or by an unknown person. On that premise the respondent was without any authority to pay out or debit the account of the appellant and hence liable to refund the debited sum to the appellant.

[5] At the High Court stage parties agreed that the issues to be revolved were these questions:

(a) whether the respondent honouring the 67 cheques which were the subject matter of the action in the sum of RM411,024.70 was in breach of its mandate;

(b) whether the said 67 cheques were signed and or countersigned by one Ong Ah Sim @ Ong Swee Hoe or other authorised signatories; and

(c) whether the respondent was indebted to the appellant in the above sum.

[6] Come the hearing date before us, parties agreed that the pertinent issue to be determined by the court was whether the 67 cheques were forged, and if so whether the appellant was entitled to be reimbursed.

[7] Whether the appellant is entitled to be reimbursed very much depends on whether at the material time it was a customer of the respondent in the legal sense. A permanent relationship with a bank, like having an account in it, as in this case obviously qualifies (*Commissioners of Taxation v English, Scottish and*

Australian Bank Ltd [1920] AC 683; *The Great Western Railway Co v The London and County Banking Co Ltd* [1901] AC 414). Once the respondent is a customer certain rights will rise between it and the bank, in the like of the bank ensuring customer's confidentiality and exercising care when carrying out instructions etc.

[8] Sifting through past cases banks have not been successful in asserting that a customer is under a duty of care to take precaution in preventing the forgery of signature. With few defences available to banks on this issue, needless to say if the forgery is not proved, then the appellant's case must be dismissed. As stated above, the appellant had alleged that they were either forged by one Vong Ai Foon, an account's clerk of the appellant, and who at the material time controlled the appellant's cheque books, or by some unknown person. At the material time, the 67 cheques of the appellant required at least two authorised signatures from any two of the following persons, viz, from one Ong Ah Sim @ Ong Swee Hoe, Vong Ai Foon, Lim Moi Cheng or Ong Keng Swee. Ong Ah Sim died in 2002. To establish its case the appellant called two witnesses namely PW1 and PW2.

[9] PW1, a forensic analyst in his report stated that all the 67 cheques differed with the specimen signatures (P73) given to him for analysis. PW2, a director with the appellant from 1993–1996, and one of the signatories of the cheques testified that the specimen signatures were the signatures of Ong Ah Sim. PW2 alleged that the signatures of Ong Ah Sim @ Ong Swee Hoe on the 67 cheques were forged. He alleged that in the circumstances of the case, the respondent had no authority to pay the said cheques or to debit its account and thus held the respondent liable to repay the amount of the said cheques.

[10] The respondent's witness, DW1 in his testimony stated that he had verified the signatures on the cheques with the specimen signature card, and verified further by the manager whenever there were insufficient funds in the account. He also testified that Vong Ai Foon did not go to all the time the bank alone. On various occasions (RR 142) she accompanied Ong Ah Sim who frequently cashed the cheques. In a nutshell Ong Ah Sim was a frequent visitor at the respondent's bank. Compounded by the evidence of PW2 that he met Ong Ah Sim at the bank (RR123) when the latter was encashing the cheques, merely raises further doubt as to the implausibility that the payment of the cheques were not mandated. In fact if fraud had been committed, if indeed fraud had been perpetrated, and with the cheques in their hands, Ong Ah Sim or PW2 would have discovered it at the bank.

[11] After hearing evidence from the witnesses, the court held that the appellant had failed to prove its case and therefore dismissed the claim with costs.

[12] The learned judge critically went through the evidence, in particular every specimen signature and the 67 cheques alleged forged, by making his own observation and assessing the signatures of Ong Ah Sim's signature. On appraisal he found that the signatures in P73 were not similar, constant or consistent. In fact the signatures were subject to variations. The signatures alleged not to be that of Ong Ah Sim on the 67 cheques were also not similar, constant or consistent. The court was aware that the conclusions arrived at by PW1 were premised only on slight variations regarding the signature of Ong Ah Sim on the cheques, what with there being similarities between the signatures in the specimen cheques and the 67 cheques. A serious question thus had arisen as to the assertion that they were forged. The learned judge at the conclusion of the hearing thus was not satisfied that the signatures of Ong Ah Sim on the cheques were conclusively proved as forged, and surmised that there was every possibility that the alleged forged signatures were genuine but signed differently. He had demonstrably appreciated the evidence and supplied cogent reasons why he arrived at his factual finding. He could not be said to have been plainly wrong (*Gan Yook Chin (p) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[13] As regards his rejection of some of the evidence of PW1, the learned judge did not act outside his purview. He may accept the evidence of the expert but only if satisfied after making his own observation that it is safe to accept that expert opinion (*Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61). Further, in *Public Prosecutor v Mohamed Kassim bin Yatim* [1977] 1 MLJ 64, Hashim Yeop Sani had said:

> Evidence of experts can never go beyond an opinion and can never therefore be of absolute certainly. It has always been accepted that evidence especially of handwriting can never be conclusive. But the proper way to assess the evidence in this case would be to see whether the court could act on such evidence if there was corroboration either by direct evidence or circumstantial evidence. It is only with such approach that a proper decision can be arrived at.

[14] On the reason why a signatory signed differently Harcharan Singh Tara, the former Director General of Chemistry Department Malaysia, in an article entitled *'Examination of Handwriting and Signatures'* [1995] 3 MLJ 1 had made the following observation:

> It is not uncommon for a person to deliberately modify his signature for a specific purpose, and then disclaim it at a future date to get an advantage

[15] The learned judge further opined that it was unreasonable to expect the appellant not to know of the forgeries, and that monies were withdrawn without authority, when altogether 67 cheques had been encashed in a span of two years. If it were true that the cheques were forged, surely Ong Ah Sim

would know, as he went either alone or together with Vong Ai Fong to withdraw the monies from the bank. Their physical presence and conduct at the bank as representatives of the appellant surely would not raise any alarm bell to the respondent bearing in mind that they have been adhering to this modus operandi for two years.

[16] Vong Ai Foon who had been entrusted with the cheques and the authority to sign them, seemed to have absolute freedom to issue cheques as she liked, with or without Ong Ah Sim peering over her shoulders. Now, the appellant wants to blame the respondent for the loss. Who then is to be blamed here?

[17] It is our view that a bank is inexorably bound by a duty of care towards an account holder and has to ensure that it acts within its mandate. On the other hand, even though customers more often than not have escaped responsibility in forged signature cases, it is not in every case that they are exonerated of liability. Liability will be based on a case by case basis. In *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 3 CLJ 1, from the aspect of the bank, the Federal Court decided that a bank owed a contractual duty of care in carrying out a customer's instructions. In *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777, though not a forgery case, the customer had neglected all precautions and merely signed the cheque but leaving blank the space where the amount should have been. The court held that if a customer signs a cheque in blank and leaves it to a clerk or other person to fill it up, he is bound by the instrument as filled by his agent and thus allowed the appeal. In the course of it the court remarked:

> In my judgment, there was a clear breach of the duty which the customer owed to the banker. It is true that the customer implicitly trusted the clerk to whom he handed the document in this state to fill it up and to collect the amount, but his confidence in the clerk cannot excuse his neglect of his duty to the banker to use ordinary care as to the manner in which the cheque was drawn, he owes that duty to the banker as regards the cheque, and it is no excuse for neglecting it that he had absolute and, as it turned out, unfounded confidence in the clerk. The duty is not a duty to have clerks whom the customer believes to be honest. It is specific duty as to the preparation of the order upon the banker. *If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results*. No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. *If owing to the neglect of such precautions it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker*. (Emphasis added.)

[18] The grounds supplied by the learned judge apart, for dismissing the appellant's case, we now would like to supplement them with additional

reasons. It is no secret that at the initial stage, when a customer opens a current account in any bank, he will invariably file some application form, and thereafter after signing it deposits a certain amount of money. Unless the deposit requirement is complied with, chances are the application will fail. By all reckoning when a customer opens that current account an understanding is struck with the bank with each party respectively bound by certain duty of care (*Banking Law* by Poh Chu Chai at p 99). The latter author at p 7 had occasion to state:

> When a customer deposits money with a bank, the relationship arising is one of creditor and debtor, with the bank becoming liable to pay the money deposited when demanded by the customer (*Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32).

[19] Both parties have obligations thenceforth, and any breach of their respective obligations may subject the wrongdoer to certain legal sanctions.

[20] Apart from filing the application form a customer invariably completes a specimen signature card, from which verification of a customer's signature may be made. With the paper work now completed the customer's account becomes operable and transactions may be carried out. In relation to this case, with the account being a current account, cheques will be the necessary vehicle to operate it. Cheques are bills of exchange drawn on a banker, payable on demand and operates as a mandate or order to the drawee bank to pay and debit the account of its customer, the drawer. That being so, on receipt of any cheque, aside from a sensible business point of view, the bank must promptly meet the demand of that cheque as it is obliged to honour it (*United Dominions Trust Ltd v Kirkwood* [1966] 2 QB 43). It is not uncommon in certain circumstances that the odd forged cheques may slip the sharp eyes of bank officers as in this case, resulting in losses to customers.

[21] We now return to the mainstream and highlight the obvious weakness of the appellant's case. From the notes of proceedings it was obvious that the appellant had failed to compare and contrast the signatures on the cheques, with the signature on the signature specimen card or at worst the signature on the application form. The appellant instead, in order to establish the forgeries, had merely compared the cheques with the 24 other specimen cheques (P73), but never with the signature specimen card. In the course of the proceedings PW1 openly admitted that P73 was also never compared with the specimen signature cards kept in the bank. He testified that those specimen cheques were supplied by Messrs Shearn Delamore primarily to determine the authorship of the cheques. Yet no evidence was adduced to establish the background of these specimen cheques. About the only important finding that came out of this comparison was that, as testified by this forensic document analyst, the makers

of the 24 specimen cheques and the 67 cheques were different people as gleaned from the differences in the writing form and movement (RR72). But this finding still did not prove that the signatures on the 67 cheques were forged.

[22] The appellant here is only required to establish, on a balance of probability that the signatures on the 67 cheques were forged, in that they were not that of Ong Ah Sim @ Ong Swee Hoe. Who signed them is actually not central to the issue before us. To establish that the signatures on the cheques were not of Ong Ah Sim, comparison by necessity must be made with genuine signatures. How better to arrive at a conclusive finding, if not by comparing the signatures on the 67 cheques, with the specimen signature card of Ong Swee Hoe kept by the respondent when processing the account? It will indisputably establish that the signatures are similar or not with the specimen signature card and finally deciding on the action. The existence of this signature specimen card was confirmed by DW1 in the course of his evidence. Apart from that specimen signature card the appellant could also have subpoenaed an officer from the respondent's bank to produce the application forms, which will show the signature of Ong Swee Hoe. For some unfathomable reason this was not done. We were therefore satisfied that the appellant's approach to establish the cheques as forged, by making comparison with P73, and by no means conclusive, was a methodology that was totally unacceptable and misguided. To totally sideline the specimen signature card or the application form was disastrous for the appellant.

[23] It is trite in civil cases that he who asserts must prove, and here the appellant is the asserting party. For purposes of our appeal, as the appellant has alleged that the signatures in the 67 cheques are forgeries the onus thus lie on it to establish that fact (*Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218) The respondent is not fettered with any responsibility that it must prove that the signatures on the 67 cheques were that of Ong Ah Sim @ Ong Swee Hoe. Sifting through the evidence adduced by the appellant by no stretch of the imagination has PW1 or PW2, or the combined effect of their evidence sufficiently proved that the cheques were forged. On that premise the appellant had failed to prove its case on a balance of probability (*Doe D Devine v Wilson* [1855] 14 ER 581; *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62).

[24] Based on the above reasons we had no hesitation in dismissing the appeal with costs. The order of the High Court was affirmed and the deposit was ordered towards account of taxed costs.

Appeal dismissed with costs.

Reported by Mashrifah Ravendran